FILED
MAR 11 1998
OFFICE OF THE CLERK

No. 96-1142

In The

Supreme Court of the United States

October Term, 1997

CHEMICAL DISTRIBUTORS, INC.,

Petitioner,

vs.

RESURE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, except that in paragraph 2 of the List of Parties and Persons, the last name of Loree Peacock LeBoeuf is misspelled.

Talon Re Holdings, Inc. is the parent company of respondent Resure, Inc. There are no nonwholly owned subsidiaries of respondent Resure, Inc.

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REFERENCE TO OFFICIAL/UNOFFICIAL REPORTS

The District Court opinion is a published decision entitled "*Resure, Inc. v. Chemical Distributors, Inc.*, 927 F. Supp. 190 (M.D. La. 1996)." The United States Court of Appeals, Fifth Circuit decision is also a published decision, without opinion, entitled "*Resure, Inc. v. Chemical Distributors, Inc.*, 114 F.3d 1184 (5th Cir. 1997)."

STATEMENT OF JURISDICTION

Respondent Resure adopts the "Statement of Jurisdiction" submitted by Petitioner CDI as its own.

STATEMENT OF ISSUE PRESENTED

Under New Mexico law, where an insurance policy is clear and unambiguous and there is no evidence in the record to support an expectation of coverage contrary to that clear and unambiguous language, must the court apply the reasonable expectations doctrine?

STATEMENT OF THE CASE

Respondent Resure adopts the Statement of the Case by CDI except that Resure disputes (1) CDI's statement that the District Court explicitly refused to consider CDI's "reasonable expectations"; (2) CDI's statement that the District Court crafted "limitations upon application of the doctrine of reasonable expectations . . ."; and (3) CDI's statement that the District Court concocted factual inferences.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY REJECTED APPLICATION OF THE REASONABLE EXPECTATIONS DOCTRINE.

Evidence of the "dynamics" of the procurement of the Resure policy was before the District Court. That evidence, the Affidavit of Jerry Wood, President and Chief Executive Officer of CDI, was introduced by CDI. The Wood affidavit explained his personal, first-hand involvement in the procurement of the Resure policy. Nowhere in that affidavit does he even suggest that he was misled, duped, or the victim of a mistake. Faced with this admission of record, the District Court could not conclude that the reasonable expectations doctrine, a remedial doctrine invented to guard against unequal bargaining power involving an unsophisticated layman, should apply to the President of a multi-state chemical distribution company who personally negotiated an insurance policy that excludes damages arising from the release of pollution. The reasonable expectations doctrine has its limits and should not be invoked to create an ambiguity in an otherwise unambiguous policy provision.[1]

The record is devoid of any evidence that Jerry Wood requested coverage for damages arising from the release of hazardous chemicals into the atmosphere. The District Court was simply incredulous that the president of a company, christened "Chemical Distributors, Inc.", was caught unawares when Resure pointed out later that the policy he negotiated contained an exclusion for damages arising from the release of ***chemicals*** into the atmosphere. The "Reasonable Expectations

1. *Davison v. Business Men's Assurance Co. of Am.*, 85 N.M. 796, 518 P.2d 776, 778-79 (1974).

Doctrine" is not a get out of jail free card. And, whatever Mr. Wood may claim to have expected, the District Court justifiably found that a claimed "expectation" of coverage in the instant case was *not* reasonable.

Notably, this case was decided by the District Court on a motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part that:

> The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. Rule Civ. Proc. 56 (West 1997). In applying this federal standard, this Court has emphasized that summary judgment is not a disfavored procedural shortcut. Rather, summary judgment secures the just, speedy and inexpensive determination of a claim.[2] This Court has also ruled that if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.[3] Even if evidence presented by the non-moving party supports a claim that a genuine issue of material fact exists, summary judgment may still be granted if the evidence is merely colorable or not significantly probative.[4]

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2. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

3. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

4. *Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F. Supp. 222, 232 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).

As one court has held, "[a] party may not escape summary judgment on the mere hope that something will turn up at the trial."[5] Moreover, "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic. . . ."[6] CDI submitted Mr. Wood's affidavit as evidence of its "reasonable expectation" of coverage. Mr. Wood's affidavit is devoid of any allegation as to why he had an expectation of coverage for an event that was excluded from coverage by an undisputedly clear and unambiguous "absolute pollution exclusion." CDI, as the non-moving party, has an obligation to come forward with any facts to support its affirmative defenses. CDI failed to do so. Accordingly, under the federal standard for summary judgment outlined above, this Court should agree that the device of summary judgment was perfectly suited to the instant matter and deny the petitioner's application for a writ of certiorari.

II.

THE *BARTH* DECISION IS NOT ON POINT.

The case of *Barth v. Coleman*,[7] upon which CDI relies almost exclusively, is clearly distinguishable. In *Barth*, the underlying claim arose out of a barroom fist-fight. The premises liability policy contained an assault and battery exclusion although the owner of the barroom testified that he had specifically requested insurance coverage for assault and battery claims. In addition, because Coleman [the insured] did not

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5. *Ayers v. Pastime Amusement Co.*, 283 F. Supp. 773, 793 (D.C. S.C. 1968).

6. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (*quoting Mack v. Great Atlantic and Pacific Tea Co., Inc.*, 871 F.2d 179, 181 (1st Cir. 1989)).

7. 878 P.2d 319 (N.M. 1994).

receive a copy of the policy prior to the fight, he had no notice that the policy contained an assault and battery exclusion. Accordingly, the court properly held that Coleman had a reasonable expectation that the policy would conform to the coverage requested.[8]

Not one of the *Barth* factors are present in the instant litigation. The President and Chief Executive Officer of CDI, Jerry Wood, personally participated in procuring the policy at issue. Nowhere in Mr. Wood's affidavit does it state that he requested coverage for damages arising out of pollution or that he was misled in any respect. Furthermore, Mr. Wood had notice of the policy at issue, which was delivered in May of 1993, two months prior to the incident in question. Even a cursory review of the policy clearly evidences that Endorsement No. 3 was very prominently displayed at the forefront of the policy. This is not some exclusion that CDI can claim was hidden away in tiny print at the back of the policy.

Resure does not have the burden of proving a negative — that it did not mislead CDI. Rather, the introduction of the policy with its exclusionary language shifts the burden to CDI to show inappropriate conduct or to demonstrate a factual basis for "reasonable expectations" that are directly counter to the clear and unambiguous language of the policy. This CDI did not and cannot do. Absent evidence of improper conduct by Resure, as a matter of law, it is not "reasonable" for Mr. Wood to claim he "expected" coverage for damages caused by pollution when the "Absolute Pollution Exclusion" in the policy specifically provides otherwise.

The recent case of *Mesa Oil, Inc. v. Insurance Co. of N. Am.*[9], is instructive. There, an insured oil recycler, Mesa Oil,

8. *Id.* at 324.

9. 123 F.3d 1333 (10th Cir. 1997).

brought a state court action against its general liability insurer seeking coverage for a suit related to an environmental cleanup of a Superfund site. The insurer removed the case to federal court and moved for summary judgment based upon the pollution exclusion.[10] Applying New Mexico law, the trial court and the Court of Appeals for the Tenth Circuit held that the pollution exclusion excluded coverage.[11] Mesa Oil appealed and argued several points, one of which was that the district court erred "in failing to give adequate consideration to Mesa's reasonable expectations; and in failing to apply New Mexico's rules of interpreting insurance policies."[12] In affirming the award of summary judgment, the appellate court noted the following:

> The New Mexico Supreme Court has flatly stated that it will enforce the plain language of insurance contracts. Mesa relies on a doctrine under which New Mexico courts enforce the "reasonable expectations of the insured" to resolve ambiguities in insurance contracts. **However, the insured's expectations only come into play to resolve ambiguities once the court determines, based on the contract language together with any extrinsic evidence offered by the parties, that the contract is ambiguous.** In this case, the plain language of the pollution exclusion precludes coverage, and the district court determined that the extrinsic evidence offered by Mesa did not create any ambiguity. Thus, there was no need to resolve any ambiguity in favor of the insured. **Here, if Mesa did harbor expectations that it was insured for the ongoing oil spillage at Ekotek's**

10. *Id.* at 1334-35.

11. *Id.* at 1335.

12. *Id.*

> **facility in Utah, such an expectation would not have been a reasonable one.**[13]

In the case at hand, the District Court found that the language of the absolute pollution was clear and ambiguous. This fact is not disputed by CDI. The District Court examined in detail the evidence offered by CDI, specifically, the Wood affidavit, and found that the Wood affidavit did not create any ambiguity. Thus, there was no need to resolve any ambiguity in favor of CDI. Like the insured in *Mesa Oil*, if CDI did harbor expectations, those expectations were not reasonable based upon the clear wording of the policy.

III.

CDI DOES NOT DISPUTE THAT THE DISTRICT COURT AND THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT FOUND THE "ABSOLUTE POLLUTION EXCLUSION" IN THIS CASE TO BE CLEAR AND UNAMBIGUOUS.

By its very terms, the absolute pollution exclusion bars coverage for damages caused by toxic chemicals, no matter the cause of the chemical release and no matter the circumstances giving rise to such release. The claims asserted in the underlying lawsuits explicitly allege a pollution event encompassed within the language of the pollution exclusion; therefore, there is no coverage under the liability policy issued and no further inquiry is necessary.

It is irrelevant that the truck explosion occurred while the truck was in the service of some company other than CDI, that the explosion occurred on premises owned or operated by some

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13. *Id.* at 1340 (emphasis supplied).

entity other than CDI, and that the cause of the explosion may have been due to the fault of an entity other than CDI. The trial court aptly observed that

> [t]he second paragraph of the [absolute pollution exclusion] expressly states that this particular exclusion applies regardless of whether the discharge results from the insured's activities or from the activities of others.

No further inquiry is needed.

IV.

THERE ARE NO "COMPELLING REASONS" FOR GRANTING THE WRIT.

The United States Supreme Court Rules provide that "[a] review on a writ of certiorari is not a matter or right, but of judicial discretion." Furthermore, "[a] petition for a writ of certiorari will be granted only for compelling reasons." No "compelling reasons" are present in this case. This is not a decision on an important matter in conflict with the decision of another United States Court of Appeals. This is not a decision that decides an important federal question in conflict with a state court of last resort. This is not a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. This is not a decision of a state court deciding an important federal question in a way that conflicts with the decision of another state court or of a United States Court of Appeals. Nor is this a decision on an important question of federal law which has not been, but should be, settled by the Supreme Court. Rather, four federal judges have exhaustively considered this case and concluded that (1) under

New Mexico law, an insurance policy that excludes coverage for damages caused by pollution means what it says; and (2) it is unreasonable for one to expect coverage when the policy clearly and unambiguously says there is none and there is no evidence in the record to support the insured's claim of an expectation of coverage notwithstanding the clear and unambiguous language of the policy.

CONCLUSION

For the reasons given above, the petition of CDI is due to be denied.

Respectfully submitted,

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